UNITED
NATIONS

AT

Administrative Tribunal

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6 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 635

Case No. 701: DAVIDSON

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 21 October 1992, Gabrielle Elizabeth Davidson, a participant in the United Nations Joint Staff Pension Fund, hereinafter referred to as "the Pension Fund", filed an application requesting from the Tribunal:

"...

(a) The setting aside of the decision of the Standing Committee of the Pension Board of 2 July 1992, ...;

(b) The award of a disability pension pursuant to article 33(a) of the Regulations of the Pension Fund;

(c) The award of costs of an amount of four thousand Swiss francs."

Whereas the Respondent filed his answer on 28 May 1993;

Whereas the Applicant filed written observations on 21 July 1993;

Whereas the facts in the case are as follows:

The Applicant, a former staff member of the International Labour Office (ILO), has been a participant in the Pension Fund from 1 April 1973. On 5 July 1989, the ILO Pension Committee considered the award of a disability benefit to the Applicant, under article 33 of the Pension Fund Regulations, and decided she was not entitled to it. On 20 September 1989, the Applicant requested the ILO Pension Committee to review its decision. A Medical Board was established, under Rule K.5 of Section K of the Administrative Rules of the Pension Fund, to assist the ILO Pension Committee in the re-consideration of the Applicant's case. While the request was pending, the Applicant, on 16 October 1989, submitted to the Pension Fund instructions for the payment of an early retirement benefit. The Applicant has been the recipient of such a benefit since 1 October 1989. On 30 September 1989, the Applicant separated from the service of ILO, upon the agreed termination of her appointment, under article 11.16 of the ILO Staff Regulations.

On 16 November 1990, the ILO Pension Committee, on the basis of the Medical Board's report, unanimously confirmed its earlier decision not to award a disability benefit to the Applicant. On 17 December 1990, the Secretary of the ILO Pension Committee informed the Applicant of the decision.

On 30 July 1991, the Applicant lodged an appeal with the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) (the Standing Committee). At the request of the UNJSPB's Secretary, on 26 October 1991, the Applicant provided a detailed explanation for the delay in filing her appeal with the Standing Committee, which, under the Administrative Rules of the Pension Fund, should have been filed within three months of the receipt of the decision. She also confirmed that she would not request a new Medical Board.

On 14 January 1992, the Secretary of the UNJSPB informed the Applicant that her case would be presented to the next meeting of

the Standing Committee, on the basis of the documentation that had been submitted to the ILO Pension Committee, together with the supporting documentation and information she had provided in her various communications to the Secretary of the UNJSPB. An assessment of the Applicant's case by the medical consultant to the UNJSPB, dated 22 June 1992, was also provided to the Standing Committee.

On 2 July 1992, the Standing Committee decided to reject the Applicant's request. In a letter dated 22 July 1992, the Secretary of the UNJSPB informed the Applicant as follows:

> "After examining the documentation in your case, including the medical evidence you had provided, the Standing Committee decided that:
>
> (a) In view of the explanation you had provided for the delay in lodging your appeal to the Standing Committee, your appeal would not be deemed time-barred; and
>
> (b) The decision taken by the ILO Staff Pension Committee and confirmed upon review, that you were not entitled to a disability benefit from the UN Joint Staff Pension Fund be upheld, on the grounds that you had not been incapacitated for further service within the meaning of article 33(a) of the Fund's Regulations when you separated from ILO service on 30 September 1989."

On 21 October 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Standing Committee of the UNJSPB drew the wrong conclusions from the report of the Medical Board that had been set up to consider the Applicant's request for a disability benefit.

2. The Medical Board's report contains a number of factual errors and omissions.

Whereas the Respondent's principal contentions are:

1. The Applicant was not incapacitated for further service on the date of her separation.

2. The Applicant was accorded due process of law.

3. The decision by the Standing Committee denying the Applicant a disability benefit constituted a proper and reasonable exercise of the Standing Committee's authority and was based on medical evidence.

The Tribunal, having deliberated from 23 June to 6 July 1994, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Standing Committee of the UNJSPB (the Standing Committee), communicated to her by a letter dated 22 July 1992, which denied her a disability benefit under article 33(a) of the Pension Fund's Regulations. The Applicant separated from the ILO with effect from 30 September 1989, on the basis of an agreed termination of her appointment entered into in June 1988. The Applicant had sustained an injury in March 1988, which left her with some residual partial limitations on her range of motion. During the period from 16 May 1988 to 12 June 1988, she worked some of the time and was on sick leave for part of the time. Thereafter, the Applicant did not work but took annual leave until 8 November 1988. Under the terms of her agreed termination, her then existing appointment was terminated, with effect from 8 November 1988. As of 10 November 1988, she was given a fixed-term contract of one year, under which she was placed on special leave without pay to enable her, if she wished, to continue to contribute to the Pension Fund.

II. In connection with the Applicant's agreed termination, it was indicated that thereafter, she was going to apply for a disability

benefit from the Pension Fund on the basis of the combined effects of a serious illness she had suffered in 1985, from which she had recovered, and two subsequent episodes in which she sustained injuries. At the time the agreed termination was being contemplated by the ILO, a negative view as to her possible entitlement to a disability benefit had been expressed by the ILO's Medical Advisor. As noted above, at the time of her official separation, the Applicant was not on sick leave. Moreover, an internal ILO document dated 8 March 1988, which was submitted by the Applicant, indicates that consideration was being given to offering the Applicant an agreed termination because of a number of factors "likely to have a negative impact on her work and her working relationships." But nothing in this document or elsewhere in the record indicates any belief by the ILO that the Applicant was incapacitated for further service on medical grounds, or that this was the underlying reason for such a termination.

III. In connection with the review by the ILO Pension Committee of its denial of the award of the disability benefit to the Applicant, a Medical Board was convened. The Medical Board unanimously concluded that the Applicant had suffered adverse psychological effects stemming from earlier ailments and based on a depressive personality. It decided by a 2-1 majority (the minority being the physician appointed by the Applicant) that this did not incapacitate the Applicant on a long-term basis for further service. With the Medical Board report, and other evidence before it, the denial of the award of a disability benefit was upheld by the ILO Pension Committee and later by the UNJSPB. The criterion for entitlement to a disability benefit under article 33(a) is that the staff member must have become "incapacitated for further service ... reasonably compatible with his abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long

duration." The Applicant agrees with the Respondent's contention that this criterion does not encompass partial disability.

IV. The Applicant's appointee to the Medical Board submitted a clarifying statement making the point that, although he agreed with the basic diagnosis of the majority, he felt that this incapacitated her for further service. He also pointed out (and this is reflected in the Medical Board report) that the members of the Board had considered, in addition, whether the award of a disability benefit to the Applicant would be helpful or harmful in terms of her overcoming the adverse psychological effects. The majority felt that award of a disability benefit would be unhelpful; the minority member reached the opposite conclusion.

V. In the view of the Tribunal, the latter issue is only marginally relevant, if at all, to the central issue decided by the Medical Board. Although the majority's view is not inconsistent with its conclusion on the central issue, the matter of what might be best for the Applicant's future mental condition is not directly pertinent to the issue of her entitlement, if any, under article 33(a). As to that issue, the conclusion of the majority of the Medical Board is clear and provides reasonable support for the determination of the Standing Committee from which the Applicant appeals.

VI. The Tribunal has held consistently that it will not attempt to substitute its judgement on medical matters for a properly rendered judgement by a medical board. The Applicant also agrees that this is the governing jurisprudence. This principle is even more firmly applicable in cases involving the subject of psychological ailments and their consequences. In this area, which is open to abuse and exaggerated claims, the Tribunal would be reluctant to overturn a reasonable judgement by the Standing

Committee, predicated on a medical board conclusion. The Applicant contends that the evidence of her entitlement to a disability benefit is so clear and convincing that the Tribunal should order the Pension Board to award it to her. The Tribunal is unable to accept that contention on the basis of the record before it.

VII. The Applicant also contends that the Standing Committee's determination was procedurally flawed because it appears to have been based, in part, on a memorandum dated 22 June 1992, from the Pension Board's medical consultant, which had not been made available to the Applicant for comment before the Standing Committee rejected her request, and because that memorandum contained alleged factual errors. In addition, the Applicant asserts that the original Medical Board report was not made available to her in time for her to comment on it before it was considered by the Standing Committee. As to the latter point, while it is, of course, desirable that such reports should be made available to applicants with reasonable promptness, the Tribunal has difficulty understanding why its contents, if not the document itself, would not normally have been made available to the Applicant by the member of the Board appointed by her. (Cf. Judgement No. 502, Giscombe (1991), para. IX.) There is no apparent reason why applicants would be unable to arrange to be informed by their own appointees as to the contents of medical board reports. In any case, where this should not prove to be feasible, the Respondent should make the report available promptly. Here, it is unclear whether the Applicant was informed of the contents of the report before she received a copy. She does not press the point. In any event, she was given the opportunity to request a new Medical Board when her case was under consideration by the Standing Committee, but she declined to do so.

VIII. With respect to the Applicant's contention regarding the memorandum dated 22 June 1992, from the Pension Board's medical consultant, the Tribunal considers that it would have been the better practice for the Pension Board to have made a copy of this memorandum available to the Applicant so that she could have commented on it, if she wished, before it was considered by the Standing Committee. However, in the circumstances of this case, the Tribunal finds that this irregularity was both minor and harmless, and does not require any further action by the Tribunal.

IX. The Applicant concedes that some of the alleged errors in the memorandum were insignificant. Those alleged to be of consequence are the absence of a reference to various medical reports previously submitted by the Applicant. But there is no basis for an assumption by the Tribunal that those medical reports were not in the record before the Standing Committee. Nor was the medical consultant obliged to discuss them. Hence, the fact that the 22 June 1992 memorandum did not refer to them is of no consequence. Secondly, the Applicant asserts that the 22 June 1992 memorandum, in purporting to sum up the situation, was in error in failing to recognize that one medical report, dated 14 November 1991, previously submitted by the Applicant to the Pension Fund, stated that since 14 September 1989, the Applicant had been unfit for work. However, that medical report, which was issued long after the Applicant had ceased working for the ILO, did not state that the Applicant was incapable of further service reasonably compatible with her abilities on a permanent or long term basis. It was, therefore, not in conflict with the summing up of the situation by the Pension Board's medical consultant. Nor, as claimed by the Applicant, was the summing up inconsistent with an earlier report dated 21 October 1988, by a physician who treated the Applicant. That physician also did not assert that the Applicant was incapacitated to the point of being incapable of further service on

a permanent or long term basis. Finally, the Applicant claims that a statement in the summing up portion of the memorandum, that the Applicant had been examined by a doctor from the Joint Medical Service in Geneva, who concluded that she was not incapacitated to the point of being incapable for further service, was erroneous. Whether the doctor named had actually examined the Applicant does not appear to be of decisive importance in the circumstances of this case. The record shows that the Joint Medical Service in Geneva had been apprised of the Applicant's medical history and had informed the ILO of its belief that she was not incapacitated for work to the point of being incapable of further service. Moreover, the members of the Medical Board who also reached that conclusion, did examine her.

X. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 6 July 1994

R. Maria VICIEN-MILBURN
Execuive Secretary